No. 82-1724

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF NEW YORK,
Petitioner,

vs.

ROBERT UPLINGER, SUSAN BUTLER,
Respondents.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

BRIEF OF RESPONDENT ROBERT UPLINGER IN OPPOSITION TO PETITION FOR CERTIORARI

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Questions Presented

Is New York State Penal Law §240.35-3 (loitering for the purpose of engaging in deviate sexual intercourse, etc.) violative of the Fourteenth Amendment of the United States Constitution?

a. To the extent that the decision below is based on the premise created by *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981), did that case correctly determine that the United States Constitution protects the right of the individual adult to engage in private, consensual, noncommercial sex of a deviate nature (including sodomy and similar sexual conduct) under the constitutional right of privacy?

b. To the extent that the decision below is based on the premise that New York Penal Law §130.38 is unconstitutional as being in violation of the right to the equal protection of the laws under the United States Constitution, did *People v. Onofre, supra*, correctly so hold?

c. Is Section 240.35-3 of the Penal Law unconstitutionally vague?

d. Does Section 240.35-3 of the Penal Law violate respondent Uplinger's right to free speech?

e. Does Section 240.35-3 of the Penal Law violate respondent Uplinger's right to free association?

f. Does Section 240.35-3 of the Penal Law represent an unconstitutional and impermissible burden and impediment on the exercise by respondent Uplinger of his right of privacy as found under *People v. Onofre, supra*?

g. Is Section 240.35-3 of the Penal Law unconstitutional for any other reason raised in the record below?

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Relevant Constitutional and Statutory Material

UNITED STATES CONSTITUTION,
Amendments I, XIV

[Please see Petition, page 2, for text.]

NEW YORK STATE PENAL LAW

Section 240.35(3), Loitering, etc., and *Section 130.38*, Consensual Sodomy. [Please see Petition, page 3, for text.]

Section 130.00, "Sex offenses; definitions of terms

"The following definitions are applicable to this article: * * *

"2. 'Deviate sexual intercourse' means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva."

Section 240.20, "Disorderly conduct

"A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof;

"1. He engages in fighting or in violent, tumultuous or threatening behavior; or

"2. He makes unreasonable noise; or

"3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or * * *

"5. He obstructs vehicular or pedestrian traffic, or

"6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

"7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose. * * *"

Section 240.25, "Harassment

"A person is guilty of harassment when, with intent to harass, annoy or alarm another person. * * *

"2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or

"3. He follows a person in or about a public place or places; or * * *

"5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose. * * *"

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N.Y. Court of Appeals: *People v. Uplinger*, 58 N.Y.2d 936, _____ N.Y.S.2d _____. _____ N.E.2d _____ (1983)

County Court, Erie County: *People v. Uplinger*, 113 Misc.2d 876, 449 N.Y.S.2d 916 (County Ct. 1982)

Buffalo City Court, Buffalo, N.Y.: *People v. Uplinger*, 111 Misc.2d 403, 444 N.Y.S.2d 373 (City Ct. 1981)

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Introductory Comments

Respondent Uplinger files this Brief in opposition to the petition of the State of New York. Respondent emphasizes that this consolidated petition arises out of two separate cases, not connected with each other and

litigated on separate records in the New York courts. Respondent's arguments herein are particularly relevant to the enforcement of the New York law against homosexuals, although the statutory provisions are, on their face, applicable to both homosexuals and heterosexuals.[1]

Statement of the Case

Officer Nicosia was working undercover at the time, assigned "to talk to suspected homosexuals and arrest them if he was propositioned in public". *Petition, App. D, 4d.* Uplinger first encountered him at about 2:50 A.M. on the Buffalo street, a few blocks from Uplinger's home. Uplinger began the conversation with a "hello", "how are you", and general conversation of that nature. Nicosia joined in the conversation. Sometime while they were talking, Uplinger introduced Nicosia to some acquaintances who came along. While they were talking, other police officers directed them to move along, which

[1] At the pre-trial hearing in this matter, police testimony was offered indicating that Penal Law Section 240.35-3 was enforced against homosexuals exclusively, until the decision of *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981), declaring New York's consensual sodomy statute, Penal Law §130.38, unconstitutional. Thereafter, the deviate-sex loitering provision was used against suspected female prostitutes and their customers as well as against homosexuals. There was no evidence that either the consensual sodomy law or the deviate-sex loitering prohibition was used against heterosexual couples engaging in or contemplating non-commercial sex acts described by the statute. See references to the trial court testimony in the trial court decision of Drury, J., *Petition, App. D, 2d-3d.*

While this Respondent's arguments about the statute would in large measure be inapplicable to the position of a suspected female prostitute, as Susan Butler was, it should be observed that New York had adequate statutory recourse as to her under Penal Law §240.37, Loitering for the Purpose of Prostitution. That statute has previously been held constitutional by the New York Court of Appeals in *People v. Smith*, 44 N.Y.2d 613 (1978).

everyone did. Uplinger and Nicosia, again alone, talked further, with Uplinger inviting Nicosia to Uplinger's apartment and Nicosia asking what Uplinger wanted to do there. Uplinger gave a non-committal answer and, finally, responded by telling Nicosia that "I'll blow you" at the apartment. (Uplinger admitted and the State offered proof at trial that the quoted statement constituted a statement of intention to commit oral sodomy.) The conversation had continued for ten or fifteen minutes before that statement was made. *Petition, App. D, 4d-5d.*

There was nothing in the encounter to caution Uplinger that Nicosia would be offended by the proposed sexual act. Nicosia expressed no offense at the suggestive conversation leading up to the quoted statement. The situation (the time of night, the area of the encounter, the absence of members of the general public from the streets, the apparent desire of Nicosia to loiter and see what might develop, Nicosia's coy and interested attitude as the conversation developed) was consistent with Uplinger's mistaken impression that Nicosia, like Uplinger, was a homosexual expressing subtle interest in a potential sexual partner.

There was no one else within earshot when the statement was made. The anticipated sex was to occur in a private dwelling and not in public. The statement was made quietly and discreetly. There was no "stag line" in existence. *Cf. Petition, 17.*

Summary of Respondent's Argument

Point I. With the 1980 decision of *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981), holding that private, noncommercial, adult, consensual sodomy was protected by the federal Constitution's right of privacy, the New York consensual sodomy crime (Penal Law §130.38) ceased to be enforceable, although the statute was never repealed. The *Onofre* decision comports with the earlier cases in this Court establishing the constitutional right of privacy.

The existence of consensual sodomy as a crime, however, was a necessary predicate of the loitering-for-deviate-sex provision (Penal Law §240.35-3). Where, as in the present case, the invitation was to come to a private residence for sex, it amounted to an invitation to engage in lawful activity which was, even more significantly, constitutionally protected.

If this Court grants certiorari here, it will inevitably have to review whether the law declared in *Onofre* in 1980 was a correct interpretation of the United States Constitution. For if it was not, the reasoning adopted by the Court of Appeals in *Uplinger* necessarily falls. (*Petition, App. B, 2b).* Respondent Uplinger urges, however, that *Onofre* was properly decided.

Point II. If, however, *Onofre* was correctly decided, there is no doubt of the correctness of the decision in *Uplinger.* The statute is unconstitutionally vague on its face. Moreover, by seeking to restrict the ability of homosexuals to socialize in public unless they have no mental purpose of deviate sex with their friends at a later time and more private place, the statute restricts the right of free association. To the extent that the

statute restricts the expression of a verbal invitation to engage in a legal (indeed, constitutionally protected) act in a discreet manner, without regard to whether the addressee would likely be offended thereby, it improperly restricts the freedom of speech. Finally, the statute imposes an unacceptable impediment on the attempted exercise of a constitutional right. The statute violates the Fourteenth Amendment of the Constitution.

Point III. The questions presented are important. The Court has declined to hear this basic subject matter in the past. If the Court is now ready to review the underlying question whether the private, consensual, noncommercial sex practices of adults fall within the coverage of the federal constitutional right of privacy, the present case presents the issue squarely. If review is to be limited to the question whether *Uplinger* was correctly decided, without reaching the underlying issue, however, the matter is not sufficiently debatable to warrant this Court's review.

Respondent Uplinger's Arguments Below

In his constitutional attack on the statute, Uplinger preserved the relevant arguments, *viz.*:

> 1. The statute punished mere loitering, its terms requiring only an existing mental state and no overt conduct. As a result, due process was violated by the effort to punish mere thought or intent.[2]

[2] The County Court decision inserted into the statute the requirement of "either an overt act or other conduct unambiguously evidencing the proscribed purpose." *Petition, App. C, 6c.* This still left it vague as to what kind of conduct would suffice to permit arrest and conviction.

2. The statute did not correlate the non-criminal conduct of loitering [*Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)], on the one hand, with an objective which was a criminal offense or which the State could otherwise legitimately proscribe, on the other.[3]

3. As a result of the first two arguments, the statute provided no clear standards (a) to guide police, prosecutors and the courts in determining whether or not probable cause for arrest and conviction in particular situations existed and (b) to inform the citizen as to what conduct he had to eschew to avoid violation. The statute was, therefore, unconstitutionally vague. See *Papachristou v. City of Jacksonville, supra.*

4. The statute absolutely prohibited discreet, unobtrusive, noncommercial solicitation in a public place of sexual conduct to be performed in a private place. As a result, it

(a) impaired constitutional rights to freedom of association;

(b) impaired constitutional rights to freedom of speech.[4]

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[3] Respondent argued that the object of the loitering must either be a criminal act or an act relating to particular controlled premises [*e.g.* loitering in a transportation facility, Penal Law §240.35-6, 7; see *People v. Bell*, 306 N.Y. 110 (1953)] to meet due process standards.

[4] Respondent also preserved the arguments [1] that the statute was overbroad (thereby permitting consideration of the vagueness argument concerning the proscription of loitering for "other sexual behavior of a deviate nature" and [2] that the statute violated the equal protection guaranty because of discrimination between homosexuals and non-prostitution related hetersexuals. These arguments assumed little importance on appeal. Contrast *Petition, 12-13*, which emphasizes the particular vagueness argument which was all but ignored by Respondent below.

The argument was additionally made by *amicus* briefs and orally before the Court of Appeals that the statute unconstitutionally created impediments to the exercise of another constitutional right, the right to privacy under the United States Constitution, declared by *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981).

The Decision Below

Noting that private homosexual behavior between consenting adults had been declared protected by the right of privacy in *Onofre, supra*, the Court of Appeals held that the present statute prohibited "conduct anticipatory to the act of consensual sodomy". Because that act was not criminal, there was no basis for the State to continue to punish loitering. In answer to the People's argument that the loitering was, *ipso facto*, an act of harassment which the Legislature could prohibit, the Court held that the statute could not be so justified in the absence of a requirement that the conduct be in fact "offensive or annoying to others". *Petition, App. B, 2b.*

ARGUMENT

POINT I

***People v. Onofre* correctly decided an important constitutional issue.**

The Erie County District Attorney attempted unsuccessfully to obtain a writ of certiorari in *Onofre, supra*, 451 U.S. 987 (1981). He now alludes to the Court of Appeals' decision in *Uplinger* as being "an improper extension of an unfounded decision" (referring to *Onofre* by the latter description) [*Petition, 6, fn. 1*] and asks that this Court review the correctness of the *Onofre* holding on the consensual sodomy provision as well as the present holding on the proscription against loitering for purposes of deviate sex.

Inevitably, if this Court grants certiorari in *Uplinger*, it will be called on to address the fundamental question of *Onofre*: whether private, consensual, adult and noncommercial sex acts are protected by the federal constitutional right of privacy attaching to certain fundamental personal decisions and relationships. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

In *People v. Onofre*, *supra*, the New York Court of Appeals could find no objective harm to the public morals or welfare which would justify governmental prohibition of private, variant sex acts described in the statute as "deviate".

> "In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions—such as those made by defendants before us—to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting." *People v. Onofre, supra*, 51 N.Y.2d at 488.

On a record developed in three separate prosecutions, involving both the public and private commission of variant sex acts, the Court of Appeals reversed all convictions and struck the statute down.

> "Because the statutes are broad enough to reach noncommercial, cloistered personal sexual conduct of consenting adults and because it permits the same

> conduct between persons married to each other without sanction, we agree with defendants' contentions that it violates both their right of privacy and the right to equal protection of the laws guaranteed them by the United States Constitution." *People v. Onofre, supra,* 51 N.Y.2d at 485.[5]

Onofre acknowledged the fact that what has in fact been upheld in the privacy decisions of *Griswold, Stanley, Eisenstadt* and *Roe* has been the right of the individual to make intimate decisions of how he would experience his sexuality, free of interference from the state, absent special factors justifying such interference.

> "In sum, there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct. Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures; absent the elements of force or of involvement of minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice, and absent too intrusion on the sensibilities of members of the public, many of whom would be offended by being exposed to the intimacies of others. Personal feelings of distaste for the conduct sought to be proscribed by section 130.38 of the Penal Law and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the

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[5] The Court of Appeals declined, on motion for reargument, to expand the ruling to include a finding of violation of the New York State Constitution's guarantees. 52 N.Y.2d 1072 (1981). Although the Court was not similarly specific as to the source of its ruling in the sequel decision of the *Uplinger* case, it made it plain that it was applying the same law as in *Onofre. Petition, App. B, 2b.*

> State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution—areas, the number and definition of which have steadily grown but, as the Supreme Court has observed, the outer limits of which it has not yet marked." *People v. Onofre, supra,* 51 N.Y.2d at 490.

People v. Onofre was one of the more forthright of a growing number of decisions which have extended constitutional protection to private sexual conduct between consenting adults. See *State v. Saunders,* 75 N.J. 200, 381 A.2d 333 (1977); *State v. Pilcher,* 242 N.W.2d 348 (Iowa 1976); *Baker v. Wade,* 553 F.Supp. 1121 (1982). *Cf. Nemetz v. Immigration & Naturalization Service,* 647 F.2d 432 (4th Cir. 1981); *Lesbian Gay Freedom Day Committee, Inc. v. Immigration & Naturalization Service,* 541 F.Supp. 569 (N.D.Cal. 1982); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.,* 24 Cal.3d 458, 156 Cal.Rptr. 14, 595 P.2d 592 (1979); *Commonwealth v. Bonadio,* 490 Pa. 91, 415 A.2d 47 (1980) [sodomy statute declared constitutionally infirm on equal protection grounds; privacy issue not reached]. See also, *Doe v. Commonwealth's Attorney,* 403 F.Supp. 1199, at 1205 n. 3 (Merhige, J; dissenting).[6]

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[6] Decisions denying the claim of constitutional protection include *Lovisi v. Slayton,* 539 F.2d 349 (4th Cir. 1976), *cert. den.* 429 U.S. 977 (1976); *Wilson v. Swing,* 463 F.Supp. 555 (M.D.N.C. 1978); *State v. Santos,* 413 A.2d 58 (R.I. 1980); *Neville v. State,* 290 Md. 364, 430 A.2d 570 (1981); *State v. Elliott,* 89 N.M. 305, 551 P.2d 1352 (1976), later appeal, *State v. Elliott,* 89 N.M. 756, 557 P.2d 1105 (1977); *State v. McCoy,* 337 S.2d 192 (La. 1976). See, also, *United States v. Lemons,* 697 F.2d 832 (8th Cir. 1983), which declined to reach the privacy issue raised where the sex there involved occurred in public.

POINT II

If *Onofre* was correctly decided, the correctness of the decision below in *Uplinger* is beyond doubt.

But for the striking down of the consensual sodomy provision (Penal Law §130.38) in 1980, the Court of Appeals could not have struck down the loitering-for-deviate-sex law (Penal Law §240.35-3) in 1983. The fact that the object of the prohibited loitering was the commission of a criminal act would have been a complete answer to any challenge. *People v. Smith*, 44 N.Y.2d 613 (1978).

With the criminal nature of the object of the loitering removed, however, the decision in *Uplinger* became inevitable. Either the flat and unqualified prohibition of a person being in a public place with an intent (however fleeting or momentary) of soliciting someone to go home and engage in deviate sex was an unconstitutional impediment imposed on the attempted exercise of a constitutional right [*compare Carey v. Population Services Int'l*, 431 U.S. 678, 688 (1977) and cases there cited] or it was an impingement on the freedom of speech inherent in any solicitation communication. See *N.A.A.C.P. v. Button*, 371 U.S. 415 at 438-439 (1963); *Bigelow v. Virginia*, 421 U.S. 809 at 818 (1975); *State of Oregon v. Tusek*, 52 Ore. App. 997, 630 P.2d 892 (Ct. App. Ore. 1981). Similarly, to the extent that it seeks to prevent gay men from associating with other gay men in a public place if the proscribed purpose is in their minds at any time, it seeks to restrict their free right of association, without any requirement for the showing of any illegal act or objective. See *Sawyer v. Sandstrom*, 615 F.2d 311 (5th Cir. 1981); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

Moreover, the statute clearly violates the constitutional right to due process by stating its prohibitions in terms so vague as to prevent reasonable people from knowing what they must do to avoid violation and, further, by providing no clear guidelines to control police and judicial action in determining the existence of probable cause for arrest and conviction. A gay person in public, for example, is presumably innocent of violation of the statute while window shopping as he goes down the sidewalk; he arguably comes into violation of the statute the minute he sees another gay person who catches his fancy and forms the mental "purpose" of inviting that person home. A moment later, as he changes his mind, he is again a law-abiding person. When a fleeting state of mind, without more, can thrust one in and out of criminal status, the statute must be suspect as unconstitutionally vague.[7] See *People v. Gibson*, 184 Col. 444, 521 P.2d 774 (Colo. 1974). The same should be said of this statute as was said in *Kolender v. Lawson*, _____ U.S. _____, 51 U.S.L.Wk. 4532 (5-2-83):

> "Section [240.35-3], as presently drafted and construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to [avoid violation of the provision as written]. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has [remained

[7] This Court has no applicable judicial interpretation of the statute to rely upon, beyond the text of Section 240.35-3 itself. While the County Court attempted to avoid vagueness problems by a limiting judicial construction of the scope of the statute, albeit unsuccessfully [see *Petition, App. C, 6c*], that effort was not adopted by the Court of Appeals. The vagueness argument could have been eliminated by construing the statute as merely requiring an act of solicitation to justify arrest, but this was not done. See *Petition, App. B, 9b-10b*, Jasen, J. dissenting.

> without] the provisions of the statute and must be permitted to go on his way in the absence of probable cause to arrest." *Ibid.* at 4534.

All that the Court of Appeals has done here is to hold that one may, in a public place, have a private conversation with friend or stranger, under circumstances where the invitation would not be anticipated to be offensive to the recipient, and invite that person home to do a legal act. Offensive behavior is already outlawed in New York under the disorderly conduct statute (Penal Law §240.20) and the harassment provision (Penal Law §240.25). What the State argues for is the right to legislatively declare that certain verbal acts constitute harassment in any and all circumstances and regardless how welcome the discreetly conveyed, although prohibited, invitation may be to the hearer.

The Court of Appeals, instead, has restricted the State to punishing actual offensiveness or actual harassment when the facts of the particular incident demonstrate the same. *Petition, App. B, 2b.*

The State cites no instance where the particular jurisdiction makes consensual sodomy lawful but makes unlawful the quiet, unobtrusive solicitation for the same. The cases cited at pages 10-11 of the Petition are all cases where the solicitation provision was either struck down or construed so narrowly that it could not be applied to the factual situation present in *Uplinger*—the discreet invitation, tendered in a public place, to come to a private residence to perform sex.

POINT III

The Court should deny the present petition unless it is ready at this time to review the underlying question presented by *Onofre*: whether the constitutional right of privacy extends to private, adult, consensual sexual conduct.

This Court has repeatedly declined opportunities to opine on the specific question presented by *Onofre*. See *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D.Tex. 1970), *rev'd on other grounds sub nom., Wade v. Buchanan*, 401 U.S. 989 (1971); *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D.Va. 1975), *summary affirmance without opinion*, 425 U.S. 901 (1976); *New York v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981); *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1976), *cert. den.* 429 U.S. 977 (1976); *Canfield v. Oklahoma*, 506 P.2d 987 (Okla. Cr. App. 1973), *dis. for want of substantial federal question*, 414 U.S. 991 (1973); *Pruett v. Texas*, 463 S.W.2d 191 (1971), *dism'd for want of substantial federal question*, 402 U.S. 902 (1971).

Criminal offense cases like *Onofre* and *Uplinger* squarely involve the issue and avoid ancillary problems of standing and justiciable case and controversy considerations, frequently present in civil cases like *Doe v. Commonwealth's Attorney*, *supra*.

Because the *Uplinger* result below hinges on the correctness of the predicate ruling in *Onofre*, this matter again presents the Court with an opportunity to clarify the constitutional law in this entire area. If the Court, as a matter of policy, wishes to now address that problem, affecting as it does millions of Americans who are homosexual, as well as heterosexual Americans potentially

subject to similar prosecution for variant sexual practices, it has that opportunity.

If, instead, the Court wishes to again pass the opportunity to deal with the predicate question, it should not grant certiorari on the *Uplinger* decision. That decision is eminently correct and not legally novel or controversial.

Conclusion

The petition should be denied, unless the Court wishes to address the underlying question whether private, adult, consensual and noncommercial sex falls within the protection of the right of privacy under the United States Constitution.

Dated: Buffalo, New York
May 13, 1983

Respectfully submitted,

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